



SUPREME COURT OF THE UNITED STATES.

No. 324.—OCTOBER TERM, 1920.

The United States of America, Plaintiff in Error, vs. L. Cohen Grocery Company,	}	In Error to the District Court of the United States for the Eastern District of Missouri.
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[February 28, 1921.]

Mr. Chief Justice WHITE delivered the opinion of the Court.

Required on this direct appeal to decide whether Congress under the Constitution had authority to adopt section 4 of the Lever Act as reenacted in 1919, we reproduce the section so far as relevant (Act of Oct. 2, 1919, c. 80, sec. 2, 41 Stat. 397):

"That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessities; to conspire, combine, agree, or arrange with any other person . . . (c) to exact excessive prices for any necessities . . . Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding \$5,000 or be imprisoned for not more than two years, or both: . . ."

The text thus reproduced is followed by two provisos exempting from the operation either of the section or of the Act enumerated persons or classes of persons engaged in agricultural or similar pursuits.

Comparing the reenacted section with the original text (Act of August 10, 1917, c. 53, sec. 4; 40 Stat. 276), it will be seen that the only changes made by the reenactment were the insertion of the penalty clause and an enlargement of the enumerated exemptions.

In each of two counts the defendant, the Cohen Grocery Company, alleged to be a dealer in sugar and other necessities in the city of St. Louis, was charged with violating this section by wilfully and feloniously making an unjust and unreasonable rate and charge in handling and dealing in a certain necessary, the specifica-

tion in the first count being a sale for \$10.07 of about 50 lbs. of sugar, and that in the second, of a 100-pound bag of sugar for \$19.50.

The defendant demurred on the following grounds: (a) That both counts were so vague as not to inform it of the nature and cause of the accusation; (b) that the statute upon which the indictment was based was subject to the same infirmity because it was so indefinite as not to enable it to be known what was forbidden, and therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable; and (c) that as the country was virtually at peace Congress had no power to regulate the subject with which the section dealt. In passing on the demurrer the court, declaring that this court had settled that until the official declaration of peace there was a status of war, nevertheless decided that such conclusion was wholly negligible as to the other issues raised by the demurrer, since it was equally well settled by this court that the mere status of war did not of its own force suspend or limit the effect of the Constitution, but only caused limitations which the Constitution made applicable as the necessary and appropriate result of the status of war, to become operative. Holding that this latter result was not the case as to the particular provisions of the 5th and 6th Amendments which it had under consideration, that is, as to the prohibitions which those amendments imposed upon Congress against delegating legislative power to courts and juries, against penalizing indefinite acts, and against depriving the citizen of the right to be informed of the nature and cause of the accusation against him, the court, giving effect to the amendments in question, came to consider the grounds of demurrer relating to those subjects. In doing so and referring to an opinion previously expressed by it in charging a jury, the court said:

"Congress alone has power to define crimes against the United States. This power cannot be delegated to the courts or to the juries of this country.

"Therefore, because the law is vague, indefinite, and uncertain, and because it fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it, and because it does not inform defendant of the nature and cause of the accusation against him, I think it is constitutionally invalid, and that the demurrer offered by the defendant ought to be sustained."

The indictment was therefore quashed.

In cases submitted at about the same time with the one before us and involving identical questions with those here in issue it is contended that the section does not embrace the matters charged. We come, therefore, on our own motion in this case to dispose of that subject, since if well founded the contention would render a consideration of the constitutional questions unnecessary. The basis upon which the contention rests is that the words of the section do not embrace the price at which a commodity is sold, and, at any rate, the receipt of such price is not thereby intended to be penalized. We are of opinion, however, that these propositions are without merit, first, because the words of the section, as reenacted, are broad enough to embrace the price for which a commodity is sold, and second, because as the amended section plainly imposes a penalty for the acts which it includes when committed after its passage, the fact that the section before its reenactment contained no penalty is of no moment. This must be the case unless it can be said that the failure at one time to impose a penalty for a forbidden act furnishes an adequate ground for preventing the subsequent enforcement of a penalty which is specifically and unmistakably provided.

We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the 5th and 6th Amendments as to questions such as we are here passing upon. *Ex parte Milligan*, 4 Wall. 2, 121-127; *Munongahela Navigation Co. v. United States*, 148 U. S. 312, 336; *United States v. Joint Traffic Association*, 171 U. S. 505, 571; *McCray v. United States*, 195 U. S. 27, 61; *United States v. Cross*, 243 U. S. 316, 326; *Hamilton v. Kentucky Distilleries Company*, 251 U. S. 146, 156. It follows that in testing the operation of the Constitution upon the subject here involved the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view.

The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words "That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or

dealing in or with any necessities," constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foresee or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject.⁸ And again, this condition would be additionally obvious

"In *U. S. vs. Leonard*, District Judge Howe of the Northern District of N. Y., held that in determining whether or not a price was unreasonable, the jury should take into consideration, "*what prices the defendants paid for the goods in the market—whether they bought them in the ordinary course of trade, paying the market price at the time, the length of time defendants have carried them in stock, the expense of carrying on the business, what a fair and reasonable profit on the goods would be, and all the other facts and circumstances in and about the transaction, but not how much the market price had advanced from the time the goods were purchased to the time they were sold.*"

In *U. S. vs. Oglesby Grocery Co.*, District Judge Fitzky of the Northern District of Georgia, said:

"The words used by Congress in reference to a well established course of business fairly indicate the usual and established mode of charging and prices in peace times as a basis, coupled with some inflexibility in case of abnormal conditions. The statute may be construed to forbid in time of war, any de-

If we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution.

That it results from the consideration which we have stated that the section before us was void for repugnancy to the Constitution is not open to question. *United States v. Reese*, 92 U. S. 214, 219-220; *United States v. Brewer*, 139 U. S. 278, 288; *Todd v. United States*, 138 U. S. 278, 282; and see *United States v. Sharp*, 27 Fed. Cas. 1041, 1043; *Chicago & Northwestern R. R. Co. v. Dep.*, 35 Fed. 866, 876; *United States v. Tuxer*, 32 Fed. 917, 919-920; *United States v. Capital Traction Co.*, 34 App. D. C. 502; *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208, 237-238.

But decided cases are referred to which it is insisted sustain the contrary view. *Waters-Pace Oil Co. v. Texas*, 212 U. S. 86; *Josh v. United States*, 229 U. S. 374; *Far v. State of Washington*, 235 U. S. 273; *Miller v. Strahl*, 239 U. S. 426; *Guntenspergen v. Idaho*, 246 U. S. 344. We need not stop to review them, however,

parture from the usual and established mode of charges and prices by time of power, which is not justified by some special circumstance of the emergency or dealer."

Judge McCall of the Western District of Tennessee, in his charge to the grand jury, stated that, if a shoe dealer bought two orders of exactly the same kind of shoes at different times and at different prices, the first lot at 48 per pair and the second lot after the price had gone up to \$12 per pair "and then he sells both lots of these shoes at eighteen dollars, he is profiteering clearly upon the first lot of that only cost him 48. Now he does that upon the theory that if he sells these shoes out and goes into the market and buys again he will have to pay the higher price, but that doesn't excuse him. He is entitled to make a reasonable profit, but he certainly hasn't the right to take advantage of the former low purchase and take the same profit on them that he gets on the twelve dollar shoes."

In U. S. vs. Myatt, District Judge Connor, of the Eastern District of North Carolina, said:

"It will be observed that the statute does not declare it unlawful to make an unjust or unreasonable profit upon sugar. The profit made is not the test, and may be entirely irrelevant to the guilt of the defendant—he may within the language of the statute make an unreasonable and, therefore, unlawful 'rate or charge' without making any profit, or the rule or charge made may involve a loss to him upon the purchasing price."

District Judge Hand, of the Northern District of N. Y., in his charge to the grand jury, said:

first, because their inapplicableness is necessarily demonstrated when it is observed that if the contention as to their effect were true it would result, in view of the text of the statute, that no standard whatever was required, no information as to the nature and cause of the accusation was essential, and that it was competent to delegate legislative power, in the very teeth of the settled significance of the 5th and 6th Amendments and of other plainly applicable provisions of the Constitution; and second, because the cases relied upon all rested upon the conclusion that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded. Indeed, the distinction between the cases relied upon and those establishing the general principle to which we have referred, and which we now apply and uphold as a matter of reason and authority, is so clearly pointed out in decided cases that we deem it only necessary to cite them. *International Harvester Co. v. Kentucky*, 234 U. S. 216, 221; *Collins v. Kentucky*, 234 U. S. 634, 637; *American Seeding Machine Co. v. Kentucky*, 236 U. S. 660, 662; and see *United States v. Pennsylvania R. R. Co.*, 242 U. S. 208, 227-228.

"Furthermore, it is not the particular profits that the individual himself makes which is the basis of the unreasonable charge, but it is whether the charge is such as gives unreasonable profit—not to him, but if established generally in the trade. The law does not mean to say that all people shall charge the same profit. If I am a particularly skilled merchant or manufacturer and I can make profits which are greater than the run of people in my business, I am allowed to make those profits. So much am I allowed, but if I am charging more than a reasonable price, taking the industry as a whole, I am not allowed to keep that profit because on other items I am not gaining a loss."

In *U. S. vs. Goldberg*, District Judge Mason, of the Southern District of California, charged the jury that, in passing on the question of the reasonableness of prices for sugar the jury should take into consideration, among other circumstances, the following:

"That there was, if you find that there was, a market price here in the community or generally with respect to the profit that normally should be made upon sugar sold either by manufacturers or jobbers and retailers."

In *U. S. vs. Callerton, etc. Co.*, District Judge Walker, of the Eastern District of Washington, on the trial of defendant on July 8, 1920, charged the jury, among other things, that as a matter of law, defendant was entitled to sell its goods on the basis of the actual market value at the time and place of sale over and above the expense of handling the goods, and a reasonable profit, and that the original cost price became immaterial, except as it threw some light upon the market value.

It follows from what we have said that, not forgetful of our duty to sustain the constitutionality of the statute if ground can possibly be found to do so, we are nevertheless compelled in this case to say that we think the court below was clearly right in holding the statute void for repugnancy to the Constitution, and its judgment quashing the indictment on that ground must be, and it is, hereby affirmed.

Affirmed.

Mr. Justice PITNEY concurs in the result.